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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19...

No. 71-676

WILTON EUGENE COLEMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Wilton Eugene Coleman, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on October 21, 1971.

OPINIONS BELOW

The order of the Court of Appeals below was accompanied by an unreported memorandum opinion (Appendix A, *infra*, p. A-1). The memorandum opinion of the District Court denying defendant's motion for new trial was not reported (Appendix B, *infra*, p. A-2). The order of the District Court denying discovery, referred to in the opinion of the Court of Appeals, is appended hereto (Appendix C, *infra*, p. A-14).

JURISDICTION

The judgment of the Court below (Appendix, *infra*, p. A-1) was entered on October 21, 1971. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was deprived of due process of law and denied a fair trial in the District Court by the introduction in final argument by the prosecuting attorney for the United States of the fact, timing, and substance of an incriminating statement of a material witness of the United States, which statement came within the purview of the Jencks Act, 18 U.S.C., § 3500, but which was not introduced into evidence.

2. Whether the District Court erred in denying petitioner's motion for the discovery of exculpatory material within the knowledge of the United States by accepting, without inquiry, the bare allegation of the United States that from its investigation it knew of nothing that was, nor would lead to that which was, favorable to the defendant.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. The Fifth Amendment, United States Constitution

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

2. The statutes and rules involved are the statutes under which petitioner was prosecuted, 18 U.S.C., § 371, and 18 U.S.C., § 2113 (a) (b) (d), the Jencks Act, 18 U.S.C., § 3500, and Rule 52(b) of the Federal Rules of Criminal Procedure. Because of their length, their pertinent text is set forth as Appendix C, *infra*, p. A-16.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of conspiring to rob a branch of the Hamilton National Bank in Chattanooga, Tennessee, a violation of 18 U.S.C., § 371, and 18 U.S.C., § 2113 (a), (b) (d).

The Government, having no physical evidence against petitioner, relied on the testimony of two female witnesses, one a member of the conspiracy, the other, Shirley Friar, a girl friend of petitioner. The female conspirator stated that the petitioner participated in the conspiracy to rob the bank on several occasions, including the night before the bank was robbed. Her testimony, however, was effectively refuted by her boy friend, also a conspirator, who denied petitioner's role as a conspirator.

Because of the effective impeachment of the female conspirator and because of the paucity of other evidence against the petitioner, the Government in final argument emphasized the contents of a Jencks Act statement made by the petitioner's girl friend, to the effect that the petitioner had known and had seen the female conspirator and her boy friend and in fact had seen her combing a blonde wig the night before the bank was robbed, facts which the petitioner denied at trial and which were material to the Government's case.

The Government did not formally introduce this Jencks Act statement into evidence and never referred to its existence during the trial, yet it premised the concluding, and most important, segment of its final argument with the fact and content of that Jencks Act statement.

This act of prosecutorial misconduct formed the basis of the petitioner's motion for new trial. The District Court

recognized that the prosecution had erred, yet decided that no substantial right of the petitioner was affected by this misconduct.

The Court of Appeals accepted the opinion of the District Court and likewise held that the error during final argument was harmless. Both Courts reached this conclusion in spite of the fact that the jury had a difficult and lengthy time reaching a decision in the case, having to retire for the night and return the next day and, in fact, having to ask for certain testimony to be repeated.

Prior to the trial in District Court, the petitioner filed a motion for discovery and inspection of, among other things, all material in the possession of the Government which was, or would lead to that which was, exculpatory in nature. The Government, in spite of a lengthy and comprehensive investigation of the conspiracy, asserted categorically that it knew of nothing exculpatory in nature. The District Court, without further inquiry, accepted on its face the representation of the Government and denied petitioner's request. The Court of Appeals agreed with the District Court and held that the Trial Court had no obligation to look beyond the denial of the Government.

REASONS FOR GRANTING THE WRIT

A

The Court of Appeals has decided a federal question in a way in conflict with the decisions of other Courts of Appeals.

In **Johnson v. United States**, 347 F.2d 803 (D.C. Cir. 1965), the prosecution in final argument commented on certain statements made by a State's witness prior to trial. These statements had been given to defense counsel who had exercised his rights under the Jencks Act at the end of the testimony of that witness. The prosecutor, however, had made no use of these statements in his examination of his witness. The Court held that the prosecutor's comment on the pre-trial statements during final argument was improper, rejecting the contention of the Government that the receipt by defense counsel of the Jencks Act statements and his failure to use them were events which occurred in plain sight of the jury and were proper subject matter for comment.

"It is elementary," the Court observed, "that counsel may not premise arguments on evidence which has not been admitted." 347 F.2d at 805, the Court citing **Robinson v. United States**, 32 F.2d 505 (8th Cir. 1928); and **Latham v. United States**, 226 F. 420 (5th Cir. 1915).

The Court concluded:

> "It is a well known rule of evidence, applicable in criminal and civil cases alike, that prior consistent statements may not be used to support one's own unimpeached witness. The Jencks Act gives the defendant the unqualified right to inspect prior statements of Government witnesses made to Government agents and relating to the subject matter of their testimony,

but it does not abrogate this time-honored common law evidence rule. No one would seriously argue that the Government could formally introduce Jencks Act statements in support of its own unimpeached witness. Yet the comments of the prosecuting attorney in this case accomplish virtually the same result in the minds of the jurors. Based as they are on inadmissible evidence, such comments are not permissible." 347 F.2d at 805.

Although **Johnson v. United States** speaks most directly to the facts of the instant case, other cases covering analogous situations emphasize that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence. **United States v. Spangelet**, 258 F. 2d 338, 342 (2d Cir. 1958); **Reichert v. United States**, 359 F.2d 278 (D.C. Cir. 1966); **Graham v. United States**, 257 F.2d 724 (6th Cir. 1958).

In **Graham v. United States**, a Sixth Circuit case, the Court held improper the action of the United States Attorney, in his closing argument to the jury, to read a portion of a search warrant affidavit that had not been formally received in evidence. Since the factual issue in the case was a close one, the effect of the errors of the prosecution was prejudicial and the judgment was reversed.

The petitioner did not make a protest when this error by the attorney for the Government was made. Rule 52(b), Federal Rules of Criminal Procedure, states that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." The District Court, in its Memorandum Opinion that was accepted by the Court of Appeals, maintained that the petitioner's failure to object precluded the granting of a new trial and reversal of the judgment.

However, the impropriety of the attorney for the Government was no mere technical error nor defect that did not affect the substantial rights of the parties. See **United States v. Graham**, 325 F.2d 922 (6th Cir. 1963); **United States v. Compton**, 365 F.2d 1 (6th Cir. 1966).

The reasoning of the District Court conflicts with that of the Court of Appeals in **Garris v. United States**, 390 F. 2d 862 (D.C. Cir. 1968). In that case the prosecutor introduced certain facts in his final argument which were not admissible into evidence. As in this case, the Government did not contend that it did not act improperly, and the Government urged that the error was harmless and that no objection was made. The Court of Appeals in **Garris**, however, decided differently than the District Court and the Court of Appeals in the petitioner's case:

> "The Government does not now seriously contend that this was defensible as a matter of fair procedure. It rests, rather, upon the fact that no protest was made by the defense at the time the argument was made, and urges that there was no plain error within the meaning of Rule 52(b), Fed. R.Crim. P. But, once the facts in question were suddenly stated to the jury in the course of the prosecutor's summing up, the defense might well have had to make a snap judgment as to whether only greater harm could come from interrupting the argument to the jury and thereby focussing the latter's attention even more emphatically upon the facts in question. We do not think the Government may now complain that the defense failed to impale itself upon one horn or the other of the dilemma imposed upon it by the prosecutor's lapse.
>
> The Government also urges that no prejudice could have ensued because of the strength of its total case. But, as noted above, the emphasis placed by the

prosecutor upon the extra-record facts in his summation indicates his high appraisal of their importance. His own estimate of his case, and of its reception by the jury at the time, is, if not the only, at least a highly relevant measure now of the likelihood of prejudice. Taking that estimate into account, we find a new trial to be necessary.".

The Government in petitioner's case considered the extra-record facts highly important. Its timing and emphasis show this. It is difficult to tell exactly what influences a jury, but it is fair to say that the extra-record account of the blonde wig was a detailed revelation that influenced the jury, especially in view of the overnight break between deliberations.

The Government considered the fact that the witness Shirley Friar had made these statements to the FBI two days after the bank robbery significant, and significant it was. Because the Government never formally introduced her statement nor in fact indicated when she made such statement, nor to whom, defense counsel was placed in a dilemma. He could not risk entering such statement himself solely for the purpose of attacking it and instead relied on the time-honored rule against arguing new matter in summation. Unfortunately for the petitioner, the Government chose not to abide by this rule. It is well settled that prosecutorial misconduct can amount to plain error that affects substantial rights of the defendant. **King v. United States**, 372 F.2d 383 (D.C. Cir. 1967); **Wallace v. United States**, 281 F.2d 656 (4th Cir. 1960). This misconduct can deprive a defendant of a fair trial in dereliction of his right under the Fifth Amendment.

The standard normally to be applied on review in federal cases was set out in the leading case of **Kotteakos v. United States**, 328 U.S. 750, 764-65 (1946):

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand. . . . But if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Where the scales are quite evenly balanced, as in this case, and where the jury had a difficult time reaching a decision, in fact asking for certain testimony to be reread, it is not enough to say "that guilt may be deduced from the whole record." **Bihn v. United States**, 328 U.S. 633, 639 (1946). What must be asked is whether the conviction is certain that the Government's improper argument did not influence the decision of the jury and did not sway its judgment. It appears that this cannot be answered "Yes." As a result the decisions of the District Court and the Court of Appeals are in error.

B

The Court of Appeals has decided an important question of law which has not been, but should be, settled by the Supreme Court.

In response to the petitioner's motion for discovery and inspection, the Government stated flatly that, insofar as the petitioner sought exculpatory material, "the United States to its knowledge has no such information or evidence in its possession." The District Court accepted the

Government's representation on its face in spite of the fact that during the nearly nine months of investigation the Government **must** have found something favorable to the petitioner. The Court of Appeals concurred.

It is impossible for the appellant to come forward now and show exactly what the Government knew or possessed, for the Government never chose to reveal what it knew and the District Court never inquired further. With certain exceptions, some locksmithing manuals of one Tommy Wooten and the record of the trial of the co-conspirators, all of which the Government did not acknowledge to be favorable to the petitioner, there is no direct evidence of what was concealed. Reasonable inferences, however, can be drawn to the effect that the Government did in fact possess other exculpatory material, for an investigation of the Government's scope had to have revealed much more that was favorable to the petitioner.

Brady v. Maryland, 373 U.S. 83 (1963), required the prosecution to produce documents exculpatory in nature. In **Brady** a statement of a codefendant was withheld by the prosecution. Although there was a request for the production of the document involved in **Brady**, Justice Fortas pointed out in another case that this element is not decisive: "If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceedings—is not a sporting event." **Giles v. Maryland**, 386 U.S. 66, 102 (1967).

Numerous cases have held that the deliberate or negligent failure of the prosecution to divulge exculpatory material violates due process under **Brady**. **United States v. Keogh**, 391 F.2d 138 (2d Cir. 1968); **Guerrero v. Beto**, 384 F.2d 886 (5th Cir. 1968); **Powell v. Wiman**, 287 F.2d 275 (5th Cir. 1961); **Levin v. Clark**, 408 F.2d 1209 (D.C. Cir. 1967); **Barbee v. Warden**, 331 F.2d 842 (4th Cir. 1964);

Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); **Hamric v. Bailey**, 386 F.2d 390 (4th Cir. 1968).

Levin v. Clark, *supra*, involved the fortuitous discovery at a habeas corpus hearing of a pre-trial statement of a witness who had not been introduced at trial and whose presence, had defense counsel known of it, could have changed the course of the trial. In the instant case there has yet been no fortuitous occurrence that revealed exculpatory statements. All that the petitioner can present at this time are certain locksmithing ledgers and books, the record of the trial of the co-conspirators, and the inferences that ought reasonably to be drawn from this clear hint of the Government's knowledge of other exculpatory material. This, though, ought to be sufficient because the District Court in its denial of petitioner's motion effectively shut the door on petitioner's further requests for the discovery of exculpatory material, even though the inference and the evidence showed there was such exculpatory material.

Because of the circumstances of this case, the District Court erred in accepting at face value the prosecution's denial of the knowledge of favorable evidence. "When there is substantial room for doubt, the prosecution is not to decide for the Court what is admissible or for the defense what is useful." **Griffin v. United States**, 183 F.2d 990, 993 (D.C. Cir. 1950). The District Court here, however, let the prosecution decide in spite of the rule in **Griffin** and what was stated in **Denson v. Peyton**, 299 F. Supp. 752, 758-59 (S.D. W. Va. 1969): "It is clear, however, that it is not to be left to the prosecution to decide what evidence is material and relevant to each particular case."

In the instant case the course of the trial was doubtless altered, and the outcome perhaps changed, because the Government denied it knew of any evidence favorable to

the petitioner and did not allow petitioner access in even the slightest degree to its vast storehouse of knowledge about petitioner's case that was gathered in the nearly nine months of investigation. How much the Government knew is uncertain. The District Court, however, had the duty of inquiring beyond the Government's striking denial. The District Court failed to do this and by its failure the petitioner was not given a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Wilton Eugene Coleman,
Defendant-Appellant.

No. 71-1217

ORDER

(Filed Oct. 21, 1971)

Before: McCree, Brooks and Kent, Circuit Judges.

Defendant-Appellant appeals his conviction, following a trial by jury, for conspiracy to rob a federally insured bank in violation of 18 U.S.C., § 371.

Upon consideration of the record, the briefs and oral arguments of counsel, it is concluded that the judgment of conviction should be affirmed. The reasons for affirmance are stated by Judge Frank W. Wilson in his memorandum denying defendant's motion for a new trial,[1] and in his memorandum and order partially denying defendant's motion for discovery.[2]

It is so Ordered.

Entered by order of the Court

JAMES A. HIGGINS, Clerk

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[1] The memorandum's quote from Kotteakos v. United States, 328 U.S. 750, 765, should read "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

[2] For additional authorities see United States v. Moore, 439 F.2d 1107 (6th Cir. 1971); United States v. Conder, 423 F.2d 904 (6th Cir. 1970).

APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Southern Division

United States of America vs. Wilton Eugene Coleman a k a Smokey Coleman	Criminal No. 12,806

MEMORANDUM

(Filed: January 20, 1971)

The defendant, Wilton Eugene Coleman a k a Smokey Coleman, was charged in a single-count indictment with conspiring to rob the South Broad Street Branch of the Hamilton National Bank, Chattanooga, Tennessee, in violation of 18 U.S.C., § 37. The defendant was tried by a jury and found guilty of the charge in the single-count indictment. This action is presently before the Court upon the defendant's motion for new trial which asserts three grounds:

1) The verdict is contrary to the weight of the evidence;

2) The verdict is not supported by substantial evidence; and

3) The defendant was substantially prejudiced and deprived of a fair trial by reason of certain statements made by the Assistant United States Attorney during his final argument.

Having considered the first two grounds of the defendant's motion, the Court is of the opinion that they are without merit and should be denied.

The third ground of the motion for new trial asserts that prejudicial error was committed as a result of certain statements made by the Assistant United States Attorney in his final argument.

The defendant contends that counsel for the Government in his closing argument made reference to certain matters that were not in fact testified to in the evidence. More specifically, it is contended that prejudicial error was made when Government's counsel, among other matters, argued (1) that the witness, Shirley Friar, had stated that she gave a statement to the FBI two days after the bank robbery, and (2) that she had testified that when she had visited the residence of Harold Hall in the company of the defendant on the night before the bank robbery, the defendant had told her that he had seen Jean in the house combing a blonde wig. It is contended that neither of these items of evidence was in fact testified to by the witness Friar.

As a preliminary matter it should be noted that no objection was made by counsel for the defendant, who was retained, at the time of the matters now complained of in the argument nor at any time during the trial. No notice of any kind was made of the matters now complained of as error and no attempt was made to correct any error in this regard at the trial. Accordingly, no opportunity was afforded either unto counsel for the Government or unto the Court to correct the same. Rather, the matters now complained of were first raised in the motion for new trial. Accordingly, these matters must be considered in accordance with the "plain error" provisions of Rule 52(b), **Federal Rules of Criminal Procedure.**

Before considering further the provisions of this rule, the Court will first look to the record upon the trial to determine the nature and extent of any inaccuracy in the argument of the attorney for the Government. In doing

so, it will first be noted that the following is the sum total of all of the argument made by Government's counsel regarding the testimony of the witness, Shirley Friar, including the argument now the subject of complaint:

> What happened, on February 11th, he admitted he was there, you see, and before he went out there what transpired? Well, he was with Shirley Friar, his girl friend, wasn't he?
>
> Now, Mrs. Friar admitted that two days after the bank robbery she gave a statement to the FBI. That's two days after the bank robbery.
>
> Now, what was it she told them two days after the bank robbery? She said that on, shortly before the bank robbery she heard Mr. Coleman call Harold Hall's house and she heard him call the answering party by the name of Jean. It just so happens Mrs. Alexander's first name is Jean, and when the call was over, naturally, she's dating Mr. Coleman, she wanted to know who Jean was since it was a female, and what was it she told them two days after the bank robbery, what was it she told the FBI that Mr. Coleman said? She asked who Jean was and he said that Jean was the wife of Sam.
>
> I want you to remember what she told the FBI now before things could be fabricated, you see, and get your pictures lined up. Now, Mr. Coleman denied that from the witness stand because that would show who Sam somebody was and the inference would be whom, Sam Scruggs. Of course, he has to deny that, which he did.
>
> Now, what else happened on February 11th? Now, this is Miss Friar. On February the 11th he came, that is, Mr. Coleman, to her house, and as soon as he gets there, he called Harold Hall's residence, and

what did he ask? He asked if those people from out of town had arrived, and again, Mr. Coleman denied that from the witness stand.

Now, these statements were made before anything could be thought up as to what to say and not to say. There's no reason to believe Miss Friar now has any ill feeling towards him, that she were jilted. Don't get this rejected suitor in there or someone who has some animosity towards Mr. Coleman because her statements were two days after the bank robbery. They were still dating, ladies and gentlemen of the jury, and yet they went on out to the house and when they got there Harold came out of the house. Harold came out and left and after they left they went over to a station, filling station, and after they left Harold Hall at the station, they started back home, and you remember the testimony and she was questioned about that and she asked Smokey who was the woman she had seen in the Cadillac there at Harold's house—you remember those statements—who appeared to be a blond or wearing a blond wig, and what was it that Smokey Coleman told her?

He said it must have been Jean wearing a blond wig as he had seen her combing one while he was in the house.

Now, this is not testimony again, as I say, that was not a statement that was given a month or weeks after the bank robbery, that was two days as she's admitted. Of course, who denies that? Mr. Coleman denies he even said it.

I asked him why would she say that. I don't know. I don't know why she would make those statements.

There again incriminating because they show he knew who was in the house and he had to say, "No, I

didn't make them," because Jean Alexander is Jean and Sam Reed Scruggs is Sam.

Looking next to the evidence upon the trial to determine what extent, if any, the foregoing argument misstates the testimony of the witness, Shirley Friar, a summary of her testimony is as follows:

On direct examination Miss Friar testified that she was unmarried and that she had been dating the defendant for the past 4½ or 5 years. Upon two or three occasions in January or February of 1970, while dating Mr. Coleman, he had taken her with him to the residence of Harold Hall, whom she had also known for several years. On each such occasion she had remained in the automobile while Mr. Coleman went into the house, where he would remain some 30 minutes or so. On one occasion in January of 1970 Mr. Coleman called Mr. Hall's residence from Miss Friar's home and he used the name "Jean" in talking with the person who answered. When Miss Friar then inquired of the defendant as to who "Jean" was, he advised her that she was a kind of heavy set, dark headed woman who was the wife of "Sam," a friend of Harold Hall. On the evening of February 11, 1970, around 9:00 p.m., the defendant again took Miss Friar with him to the residence of Harold Hall and she again remained in the automobile while he went into the house. Before going to Mr. Hall's residence on that evening the defendant had called Mr. Hall and inquired whether the "people from out of town" were there and stated that he wanted to talk to Mr. Hall about his car. The defendant then explained to Miss Friar that he was going to talk to Hall about buying his Cadillac. On that evening the defendant was in Mr. Hall's home for some 30 minutes to an hour. When he returned to the automobile, Mr. Hall was with him. They took Mr. Hall to a nearby service station where he was to pick up a vehicle. Before letting Mr. Hall out

of the automobile the defendant told him he would call him to bring his automobile to the used car lot the next day. Defendant did not say anything about how he proposed to pay Mr. Hall for the Cadillac, but she knew that he was making good money. She was still dating Mr. Coleman "some" at the time of the trial.

Upon cross-examination Miss Friar testified that the defendant never discussed robbing a bank in her presence. The purpose for going to Mr. Harold Hall's home on February 11 was to discuss purchasing his Cadillac. On two or three other occasions she went to the Hall residence with the defendant but did not recall the dates. She did not know Jean Alexander or Sam Scruggs and had never seen them in the presence of the defendant. She had no information on a bank robbery having been planned. On the morning of February 12, the defendant called her and told her there had been a bank robbery, but she had already learned of this from the radio. On the evening of February 11, as they were leaving Hall's residence, she recalled seeing the Cadillac there. The officers had talked with her about her knowledge of these matters upon several occasions. Upon redirect examination Miss Friar stated that as they were leaving Hall's residence on the evening of February 11 she noticed a man and woman getting into a car and asked who they were and the defendant told her that it was "Jean and Sam."

Upon recross-examination Miss Friar repeated that she had noticed two people getting into a car in the driveway just as she was leaving the Hall residence and that after letting Hall out at the service station she asked the defendant who they were.

When the testimony of Miss Friar is analyzed and compared with the government counsel's argument, it is apparent that the argument is reasonably related to the testimony except in two respects. In the first place, while

Miss Friar did say that the officers had talked with her upon several occasions about her knowledge of the matters she testified to, she did not say when this occurred with reference to the date of the bank robbery. In the second place, while she did say that as she and the defendant were leaving the Hall residence on November 11 she had noted a man and a woman getting into the car in the driveway and that the defendant had explained that it was "Jean and Sam," she did not testify that the defendant said that it must have been Jean wearing a blonde wig, as he had seen her combing one while in the house.

It thus appears that the Government's attorney was in error in his reference to the testimony of Miss Friar to the extent just noted. The question therefore presents itself as to whether this argument constitutes prejudicial error entitling the defendant to a new trial or whether any error in this respect was harmless. As previously noted, this must be resolved in accordance with the "harmless error" and "plain error" provisions of Rule 52, **Federal Rules of Criminal Procedure**, which provides:

> (a) **Harmless error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) **Plain error.** Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the Court.

In defining "harmless error," the case most frequently cited in that of **Kotteakos v. United States**, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946), wherein the Court dealt with the former harmless error statute, Section 259 of Title 28 U.S.C. Among other matters the Court summarized the background of that statute by pointing out that it was adopted by Congress to stop the practice of reversing cases upon technical errors, the Court explaining

in this regard: "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sewing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained. The Court went on to state that the test for prejudice is whether the Court may say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was substantially swayed by the error." As stated by Professor Wright in his recent **Federal Practice and Procedure**, Vol. 3, § 854:

> "In applying this test the Court must necessarily look to all of the circumstances in the particular case, and decisions in other cases are only of limited value."

As regards the "plain error" provision in Rule 52, the courts have sometimes said it means, "error both obvious and substantial" [**Sykes v. United States**, (C.A. 5, 1966) 373 F. 2d 607, 612] or "serious and manifest errors" [**Feutralle v. United States** (C.A. 5, 1954), 209 F. 2d 159, 163] or "grave errors which seriously affect substantial rights of the accused" [**Wright v. United States**, (C.A. 10, 1962) 301 F. 2d 412, 414]. However the term "plain error" may be defined, it is again clear that the matter of determining whether an error is such as to affect "substantial rights" of the accused must be made with reference to the facts of the particular case and reference to other cases or definitions therein are not too helpful except as the factual circumstances therein may correspond.

In looking to the particular circumstances of the present case the following matters are material. The principal witness against the defendant in this case was Hilda Jean Alexander, who familiarly went by the name of "Jean." The substance of Mrs. Alexander's testimony was that she, along with one Sam Scruggs, who familiarly

went by the name of "Sam," were living together in Birmingham, Alabama, when they came to Chattanooga, Tennessee, in the latter part of December 1969 to see Harold Hall. Between the latter part of December and February 12, 1970, the date of the bank robbery, she and Scruggs visited Hall several times, staying at his home for several days at a time on some of these occasions. On each occasion they discussed with Hall plans for robbing the South Broad Street Branch of the Hamilton National Bank in Chattanooga. She first met the defendant upon the occasion of one of these visits to the Hall residence in the early part of January 1970. He was introduced to her by the nickname "Smokey," the man who had the information on the bank and who had furnished Hall with a key to the bank. Coleman's wife worked at the bank where she had charge of the money vault. In addition to furnishing the key he furnished information regarding the times when the maximum amount of cash would be in the bank. When the robbery was to be committed, his wife was to indicate in some manner where the cash was kept in the vault. On one occasion when Mrs. Alexander and Mr. Scruggs were scouting the bank from a nearby parking lot, Coleman drove by with his wife in the car and spoke to them. He later told them what she would be wearing on the date of the robbery so that the robbers would know her. Coleman advised them that the most money would be in the branch upon Wednesday evening or Thursday morning of the week. He was to get 10% of the proceeds of the robbery for "fingering" the bank.

Coleman met with them on three successive Wednesday evenings at Hall's residence and they went over the bank robbery plans. He was not to participate in the actual robbery. On the first occasion the robbery was called off when one of the men who was going to participate backed out after they got to the bank. On the

second occasion they were frightened off after they got into the bank by a police radio call. On the third occasion, February 12, 1970, they went through with the robbery and got some $56,000. Participating in the actual robbery were Harold Hall, Sam Scruggs, Ollie Ensley, and Charles Crews. Mrs. Alexander acted as a lookout and drove the getaway car. The night before the robbery, February 11, 1970, the defendant Coleman came to the Hall residence and went over the plans of the robbery with the others. Coleman stated on that occasion that the plans looked good to him and that he would see them the next day to pick up his share of the money. After the robbery the next day, he told them that they had missed $129,000 which was behind a door. After the robbery had been committed, those who participated in it returned with the money to Harold Hall's residence. Within an hour the police came to the house. Hall, Mrs. Alexander, and Ensley were arrested at that time and the money was recovered. Sam Scruggs escaped. Crews committed suicide. Scruggs was later captured, but Mrs. Alexander and Hall helped him escape from jail. He was again recaptured and he and Mrs. Alexander and Harold Hall and Ollie Ensley were each tried and convicted of the bank robbery. Mrs. Alexander at the time of her testimony was serving a 14 year sentence, she not having taken an appeal.

In addition to Mrs. Alexander and Miss Friar, whose testimony was summarized above, the Government produced two other witnesses who corroborated portions of the story of Mrs. Alexander.

Upon consideration of the full record, it is apparent that the testimony of Miss Friar was significant only as it may or may not have corroborated the testimony of Mrs. Alexander in the following four particulars: (1) Miss Friar testified that the defendant knew Harold Hall and

that the defendant was in the home of Harold Hall upon several occasions in January and February of 1970; (2) Miss Friar testified that the defendant was in the home of Harold Hall upon the evening of February 11, 1970; (3) Miss Friar testified that the defendant referred to a "Jean" and "Sam" as also being acquaintances of Hall; and (4) Miss Friar testified that the defendant stated that "Jean" and "Sam" were the parties seen leaving the Hall residence on February 11. With respect to the first and second matters stated above, the defendant admitted in his testimony the correctness of these. The defendant denied only that he knew Jean and Sam or that he had identified them as being at the Hall residence on February 11.

On the basis of the above analysis, it is apparent that the matters complained of in the argument of government counsel, to the extent that they were inaccurate, were neither substantial nor significant. The only possible relevance of the argument that Miss Friar had talked to the FBI within two days of the robbery was as this might tend to bolster her credibility. She did in fact testify that she had talked to them upon several occasions following the robbery. Furthermore, the defendant, in his cross-examination, admitted that he was interviewed by the FBI on February 14, 1970, just two days after the robbery, and further admitted that he knew that Miss Friar had been interviewed by the FBI within two days after the robbery. As regards the reference to a blonde wig in the argument, this is of little or no significance, the significant thing being that the defendant had stated to Miss Friar that "Jean" and "Sam" were the parties seen departing from the Hall residence on February 11. This latter argument was a correct statement of Miss Friar's testimony. Moreover, reference was made, without objection, to the blonde wig testimony in the defendant's cross-examination.

The Court is accordingly of the opinion, upon a review of the record as a whole, no substantial right of the defendant was affected by any inaccuracy in the argument of the government attorney. The motion for new trial will be denied.

An order will enter accordingly.

/s/ FRANK W. WILSON
United States District Judge

APPENDIX C

MEMORANDUM AND ORDER

This cause of action is before the Court upon the defendant's motion for discovery and inspection pursuant to Rule 16, Federal Rules of Criminal Procedure. The motion seeks the following described information from the Government:

. . . . 10) All evidence favorable to the accused or which may lead to exculpatory evidence;

With regard to Items Nos. 1, 3, 4, 5, 9, 10, 11, 12, and 13, the Government response thereto would appear to render those requests for discovery moot and in the absence of further requests they will accordingly not be further considered. . . .

. . . However, pursuant to **Brady**, the Government is under a duty to produce evidence favorable to the accused which would encompass exculpatory statements of witnesses that the Government does not propose to call at trial. See **United States v. Ladd**, 48 F.R.D. 266 (D. Alaska, 1969); recent changes in the **Federal Rules of Procedure**, 42 F.R.D. 552, 569 (1966). The Government has heretofore represented in its response that it has no knowledge of any information or evidence in its possession that would be favorable or tend to exculpate the defendant.

Since the statements of witnesses who will not be called at trial are not discoverable under Rule 16(b) and since the Government has represented that it has no **Brady** information, the Court is of the opinion that Item 8 should be denied.

It is accordingly Ordered:

(1) That in view of the Government's response either denying the existence of the information requested or otherwise making disclosure to the defendant of the information requested, the matters requested in Paragraphs 1, 3, 4, 5, 9, 10, 11, 12, and 13 will be considered moot by the Court; and

(2) That the matters requested in Paragraphs 2, 6, 7 and 8 of the defendant's motion are denied.

Enter:

FRANK W. WILSON
United States District Judge

APPENDIX D

CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

CRIMES

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters, or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof,

so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * * * * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

* * * * * * * *

CRIMINAL PROCEDURE

§ 3500. **Demands for production of statements and reports of witnesses**

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness

or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon appli-

cation of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

FEDERAL RULES OF CRIMINAL PROCEDURE 52(b)

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

No. 71-676

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILTON EUGENE COLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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WILTON EUGENE COLEMAN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of conspiring to rob a federally insured bank, in violation of 18 U.S.C. 371, and sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A), on the basis of the memorandum opinions of the district court denying petitioner's motion for a new trial (Pet. App. B) and certain pre-trial discovery motions (Pet. App. C).

The facts adduced at trial are not in dispute and are set forth in full in the district court's opinion denying the motion for a new trial (Pet. App. B, pp. A9-A11). Petitioner helped plan the robbery of the Hamilton Bank of Chattanooga, Tennessee, on February 12, 1970. Though he did not participate in the actual robbery, he furnished his co-conspirators with a key to the bank, where his wife worked, and information when maximum amounts of cash would be in the bank.

Petitioner contends that plain error occurred at the trial when the prosecutor, in his summation, misstated without objection the evidence presented by a certain witness. This contention was the basis for petitioner's motion for a new trial, and is answered in the thorough opinion of the district court denying that motion (Pet. App. B). We rely here on that opinion, as the court of appeals did, to show that the inaccuracies in the prosecutor's argument were insignificant and not prejudicial.

Petitioner also claims that the trial judge erred in the decision regarding his pre-trial motion that the government provide him with any exculpatory materials, as required by *Brady* v. *Maryland*, 373 U.S. 83. The government replied that it had no knowledge of any such evidence and, on the basis of this representation, the trial judge denied the motion (Pet. App. C). Petitioner asserts that, although he does not know of any specific evidence favorable to him that was withheld by the government, there must have been some, and that the trial judge had a duty to make further inquiries before accepting the govern-

ment's statement. This proposition was correctly rejected by the courts below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.